OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

November 18, 2016

To:

Hon. Timothy G. Dugan
Milwaukee County Courthouse
821 W. State Street
Milwaukee, WI 53233-1427

Karen A. Loebel
Asst. District Attorney
821 W. State Street
Milwaukee, WI 53233

John Barrett, Clerk
Milwaukee County Courthouse
821 W. State Street, Room 114
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John Richard Breffeilh
Assistant State Public Defender
735 N. Water Street, Suite 912
Milwaukee, WI 53202-4105

Henry T. Spivery #625059
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

You are hereby notified that the Court has entered the following opinion and order:

2015AP2565-CRNM State of Wisconsin v. Henry T. Spivery
(L.C. #2014CF003425)

Before Kessler, Brennan and Brash, JJ.

Henry T. Spivery appeals from a judgment of conviction for one count of attempted second-degree sexual assault of a child, contrary to WIS. STAT. §§ 948.02(2) and 939.32 (2013-14).[1] Spivery's postconviction/appellate counsel, John R. Breffeilh, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Spivery has filed a response. We have independently reviewed the record, the no-merit report, and the

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

response, as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The complaint alleged that fifty-six-year-old Spivery attempted to have sexual contact with a fourteen-year-old girl who was sleeping in the same home where Spivery was staying with friends. The criminal complaint, which charged Spivery with one count of attempted second-degree sexual assault of a child, stated:

> [The victim] was sleeping and woke up to someone kissing up and down her left arm and neck. She recognized [Spivery's] head as the person kissing her. [Spivery] was leaning across the foot end of the bed toward her. [The victim] then yelled and heard [Spivery] say, "don't tell don't tell. I'll give you money". Other family members woke up and noticed [Spivery's] belt unbuckled and his pants undone. [Spivery] admitted to family members he "did it but didn't touch her". [Spivery] then crawled out a window, [and] was followed and detained by family mem[]bers until the police arrived.

Spivery waived his right to a preliminary hearing. He entered into a plea agreement with the State pursuant to which he pled guilty as charged, and the State agreed to recommend "prison, leaving the amount up to the [c]ourt."

The trial court conducted a plea colloquy with Spivery, accepted Spivery's guilty plea, and found him guilty. A presentence investigation (PSI) report was generated. It discussed Spivery's prior criminal history, which included a 1982 conviction for having sexual intercourse with a six-year-old girl and a 1989 conviction for sexually assaulting a female prison recreation supervisor. Spivery was in prison in Oklahoma from 1989 through 2012 for those crimes.

The PSI writer said that Spivery "minimizes this offense by stating he was intoxicated and thought that the girl was 'grown.'" The PSI writer recommended a sentence of six to eight years of initial confinement and eight years of extended supervision.[2] At sentencing, both trial counsel and Spivery explicitly told the trial court that they had no additions or corrections to the PSI report.

At sentencing, the State urged the trial court to impose a prison sentence but, consistent with the plea agreement, it did not recommend a particular length of time. The State discussed the details of the crime, noting that when the girl awoke to Spivery kissing her, she "opened her eyes and yelled mama" and then "jumped up and headed toward the hall to her mother's room," crying and falling down in the hallway as she did so. The State also said that Spivery told the investigating detectives "that he needs help," although "he wouldn't say what type of help."

Trial counsel asked the trial court to consider imposing and staying a prison sentence and putting Spivery on probation for eight years. Trial counsel explained that Spivery is a good candidate for probation because he made all of his court appearances, cooperated with trial counsel, entered his guilty plea shortly after the crime, maintained a full-time job, and "accepted responsibility for this case." Trial counsel continued:

> He indicated that this situation involved him drinking, that that was a huge mistake for him, and he hasn't had any alcohol since this incident. He doesn't want to do this again, and he wants counseling for that as well as sex offender treatment….
>
> He told me that he recognizes that he has a problem and that this situation occurred by more than just him being drunk, but

[2] The PSI writer's recommendation for extended supervision exceeded the maximum term of extended supervision that could be imposed, which was seven and one-half years.

> him liking girls and he needs help for that problem. He has gone to some counseling since this happened … and he has been able to talk about some of the problems he has….
>
> … [H]e's not denying his responsibility for what happened, he recognizes that he has a problem and needs help for it.

Spivery chose to exercise his right of allocution. He told the trial court:

> I accept responsibility for my actions and my past. I want to accept the punishment, and I have needed help for the longest [time] and feel if I get some help I [can] talk about my situation and my past. I don't think jail is an alternative. I'm working, I'm going to work and doing the best I can, that's all I can say.

The trial court rejected the defense's probation recommendation and imposed a sentence of ten years of initial confinement and seven and one-half years of extended supervision. It also ordered Spivery to provide a DNA sample and pay the mandatory $250 DNA surcharge.[3]

The no-merit report analyzes two issues: (1) whether there are grounds to move to withdraw Spivery's guilty plea; and (2) whether there are grounds to seek resentencing. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues. We will also address the issues

[3] There has been litigation in the court of appeals and the supreme court about the mandatory DNA surcharges being applied to felony and misdemeanor convictions where the defendant is sentenced after January 1, 2014, but committed the crimes prior to that date. *See, e.g.*, ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981). Because Spivery's crime was committed after January 1, 2014, the *ex post facto* issue identified in ***Scruggs*** and other cases is not at issue here. We have not identified any basis to challenge the imposition of the mandatory DNA surcharge in this case.

Spivery raised in his response, as well as the trial court's reference to a COMPAS report at sentencing.[4]

We begin with Spivery's plea. There is no arguable basis to allege that Spivery's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy that addressed Spivery's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court confirmed with Spivery that he knew the trial court was "not bound to accept the recommendation of either [Spivery's] attorney or the district attorney" and could "impose whatever sentence it thinks appropriate." The trial court stated the maximum term of imprisonment that could be imposed, which was twelve and one-half years of initial confinement and seven and one-half years of extended supervision. The trial court also discussed with Spivery the constitutional rights Spivery was waiving, such as his right to a jury trial and his right to testify in his own defense. In addition, the trial court discussed with Spivery the fact that he would have to register as a sex offender and could be subject to a WIS. STAT. ch. 980 commitment.

[4] "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative (continued)

In his response to the no-merit report, Spivery raises two issues with respect to the plea hearing. First, he notes that the jury instruction that was attached to his guilty plea questionnaire was WIS JI—CRIMINAL 2104, the jury instruction for the completed act of second-degree sexual assault of a child, instead of WIS JI—CRIMINAL 2105A, the jury instruction for *attempted* second-degree sexual assault of a child.[5] The printed instruction for WIS JI—CRIMINAL 2104 that was attached to the guilty plea questionnaire identified two elements: (1) the defendant had sexual contact with the victim; and (2) the victim was less than sixteen years of age at the time. The word "attempted" was handwritten in two places on the jury instruction, although Spivery in his response asserts that the word "attempted" was not handwritten on the instruction at the time Spivery reviewed and signed it. Spivery implies that because trial counsel showed Spivery the wrong jury instruction, his plea was not knowingly, intelligently, and voluntarily entered.

We are not persuaded that Spivery has identified an issue of arguable merit with respect to his knowledge of the elements of the crime. The reason that jury instructions are sometimes attached to the guilty plea questionnaire is to demonstrate that the defendant is aware of the elements of the crime to which he is pleading guilty. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (Court conducting plea hearing must "[e]stablish the defendant's understanding of the nature of the crime with which he is charged."). Although it is unfortunate that trial counsel did not choose to include WIS JI—CRIMINAL 2105A as an attachment to the guilty plea questionnaire, the trial court did not simply rely on the attachment in assessing whether Spivery understood the elements of the crime. Instead, the trial court talked with

---

Sanctions.'" ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

[5] This was not brought to anyone's attention at the plea hearing.

Spivery at length about what the State would have to prove. It read the definition of sexual contact found in WIS JI—CRIMINAL 2101A. It also explicitly confirmed with Spivery that he knew the State would be required to prove Spivery "attempted to have sexual contact with [the victim], a person who had not attained the age of 16 years," which are the first two elements of the crime identified in WIS JI—CRIMINAL 2105A. In addition, the trial court went over the third element of the crime identified in WIS JI—CRIMINAL 2105A, explicitly asking Spivery if he understood that the crime of attempted second-degree sexual assault requires that he "did acts toward the commission of that crime which demonstrate unequivocally under all the circumstances that you had formed the intent and would have committed the crime except for the intervention of another person or some other extraneous factor." *See* ***id.*** Each time he responded to the trial court's questions, Spivery confirmed that he understood the elements, and he did not ask the trial court for clarification or express hesitation. Spivery has not identified an issue of arguable merit.

The second issue Spivery raises is whether he admitted acts that constitute the crime. He asserts that "he was pleading to that he kissed [the victim's] arm and neck," not to attempted sexual assault. He claims he "made no attempt to touch [the victim's] private or intimate parts." He asserts that he "had no intention of having sex or any sexual contact" with the victim, and that the reason his belt was unbuckled and his pants were undone was "he had just come from using the bathroom."

The guilty plea hearing transcript belies Spivery's claim that he was not attempting to have sexual contact. The trial court was required to "[a]scertain personally whether a factual basis exists to support the plea." *See* ***Brown***, 293 Wis. 2d 594, ¶35. In the course of doing that, the trial court asked Spivery whether he was pleading guilty because he was guilty. Spivery

answered: "Somewhat. I'm not—Some parts." This answer led to an off-the-record discussion between trial counsel and Spivery, and to an on-the-record discussion between the trial court and Spivery. The trial court read from the complaint and asked Spivery: "What of that is true?" This exchanged ensued:

> [Spivery]: I guess I'm guilty.
>
> THE COURT: I'm sorry?
>
> [Spivery]: I guess I'm guilty, I guess.
>
> THE COURT: Well, that's the question I have for you is[—]are you admitting that you were guilty? Did you attempt to have sexual intercourse—sexual contact with [the victim] on that date in that room?
>
> [Spivery]: Yes.[6]
>
> THE COURT: All right.

Shortly thereafter, the trial court asked if it could "use the facts in the criminal complaint to stand as the factual basis." Trial counsel agreed, and the trial court reiterated: "And Mr. Spivery has already indicated and admitted that clearly in response to the [c]ourt that it was in the room and [he] intended to have—attempted to have sexual contact with the victim." Spivery did not object to this statement or otherwise contradict the trial court.[7]

[6] In his response to the no-merit report, Spivery baldly asserts that he answered "yes" to the trial court's question about his intention "out of coercion by the [trial] court." Spivery faults the trial court for not asking Spivery "to explain what he was pleading to[]." We are not convinced Spivery has identified an issue of arguable merit. The transcript demonstrates that the trial court took significant steps to ensure Spivery understood the process and was entering a knowing, voluntary, and intelligent plea. Toward the end of the hearing it asked Spivery if he understood "what's going on in court today." Spivery answered: "Yes, sir." The trial court then asked if Spivery had "any questions about what's going on in court today." Spivery answered: "No." In short, the record contradicts Spivery's claim that he was coerced.

[7] We also note that Spivery did not raise any concerns about his plea with the trial court prior to sentencing, and he did not offer any corrections to the PSI or to his trial counsel's remarks at sentencing, (continued)

Having reviewed the guilty plea hearing transcript, we are not convinced that Spivery has identified an issue of arguable merit in his response. His belated claim that he did not intend to have sexual contact with the victim is contradicted by his responses to the trial court. Moreover, his admission in court is consistent with the undisputed facts outlined in the complaint. Spivery approached the sleeping child with his pants undone and belt unbuckled, leaned over the bed, kissed her arm and neck, and then, when she woke up and screamed, he immediately offered her money to induce her not to tell anyone. Those facts imply that Spivery intended to have sexual contact with the child and, but for her waking up, screaming, and running away, Spivery would have done so.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Spivery's conversations with his trial counsel, and the trial court's colloquy appropriately advised Spivery of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Spivery's plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

---

which included trial counsel's statement that Spivery desires sex offender treatment. It was not until nine months after sentencing that Spivery wrote to the trial court to raise concerns about his plea.

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its sentencing comments addressed Spivery's character, including his prior convictions for sexual assault, and the need to protect the community. It said that the fact Spivery was released in 2012 and was convicted of this new crime in 2014 "reflect[s] that you have rehabilitative needs that can only be addressed in a structured and confined setting and you cannot be trusted in the community, you cannot be supervised in the community." The trial court also discussed the gravity of the offense, noting that the crime was "very frightening" for the victim. It observed that the victim has lost the ability "to feel safe and secure in her home" and has "to be concerned with what some other man or boy will do to her." The trial court said the crime was aggravated because Spivery violated the trust of the family with whom he was staying.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While the sentence was close

to the maximum that could be imposed, we are not persuaded the sentence was overly harsh. Spivery's past history of sexual assault, his inability to control his actions, and his acknowledged need for sex offender treatment all support the trial court's exercise of sentencing discretion.

In reviewing the sentencing transcript, we identified an additional issue that requires brief discussion. The PSI report included a COMPAS report. Our supreme court recently rejected a defendant's claim that using a COMPAS report at sentencing violates due process. *See* ***State v. Loomis***, 2016 WI 68, ¶8, 371 Wis. 2d 235, 881 N.W.2d 749. ***Loomis*** concluded: "[I]f used properly, observing the limitations and cautions set forth herein, a [trial] court's consideration of a COMPAS risk assessment at sentencing does not violate a defendant's right to due process." ***Id.***

Loomis held that "a sentencing court may consider a COMPAS risk assessment at sentencing" as long as it abides by several limitations. ***Id.***, ¶98. Risk scores in a COMPAS report "may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." ***Id.*** "Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." ***Id.*** ***Loomis*** added: "A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing." ***Id.***, ¶99.

In this case, the PSI report noted several important "cautions and limitations" for using the COMPAS report, which ***Loomis*** indicated was important. *See* ***id.***, ¶100 n.60. For instance, the COMPAS report indicated that "COMPAS is an actuarial assessment tool which has been validated on a national norming population" and which "does not … attempt to predict

specifically the likelihood that an individual offender will commit a certain type of particular offense."

At the sentencing hearing, the trial court briefly discussed the COMPAS report, reviewing Spivery's scores in several areas. Our review of the trial court's comments on the COMPAS report leads us to conclude there would be no arguable merit to assert that the trial court's use of the COMPAS report was improper or denied Spivery due process. The trial court commented on the report only briefly, and its comments implied that the report was one of many factors it was considering. *See* ***id.***, ¶99. We discern no basis to reject the no-merit report to pursue further proceedings based on the trial court's reference to the COMPAS report at sentencing.

Finally, we consider the remaining arguments Spivery raised in his response to the no-merit report. He argues that the criminal complaint "failed to allege an offense of attempted second-degree sexual assault as a matter of law" and that trial counsel performed deficiently by not raising that issue early in the case. (Capitalization omitted.) Spivery has not identified an issue of arguable merit. First, Spivery waived his right to challenge the sufficiency of the complaint by not objecting prior to his waiver of the preliminary hearing. *See* WIS. STAT. § 971.31(5)(c) ("In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived."). He even signed an addendum to the guilty plea questionnaire that stated: "I understand that by pleading guilty I am giving up my right to challenge the sufficiency of the complaint."

In addition, we disagree that the complaint failed to allege facts establishing probable cause that Spivery attempted to commit second-degree sexual assault of a child. To be legally

sufficient, the complaint—"a written statement of the essential facts constituting the offense charged"—need not contain all the factual allegations that are necessary for a conviction of the offense. *See* WIS. STAT. § 968.01(2); ***State ex rel. Cullen v. Ceci***, 45 Wis. 2d 432, 442, 173 N.W.2d 175 (1970). It must, however, contain facts "which are themselves sufficient or give rise to reasonable inferences which are sufficient to establish probable cause." ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968). The standard to which the complaint is held is one of minimal adequacy. *See* ***State v. Adams***, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989).

Applying those standards here, we conclude the complaint contained sufficient facts, and reasonable inferences one can draw from those facts, to establish probable cause. *See* ***Evanow***, 40 Wis. 2d at 226. As noted above, the complaint alleged that Spivery approached the sleeping child with his pants undone and belt unbuckled, leaned over the bed, kissed the victim's arm and neck, and then, when she woke up and screamed, Spivery immediately offered her money so she would not tell anyone. After being confronted by family members, he fled the home. He subsequently told the police that he had a prior conviction for sexual assault and "did not get the help he needed in prison." One can infer from those facts and statements that Spivery "did acts which demonstrate unequivocally, under all of the circumstances, that [Spivery] intended to and would have had sexual [contact with the victim] … except for the intervention of another person or some other extraneous factor." *See* WIS JI—CRIMINAL 2105A. For these reasons, there would be no arguable merit to filing a motion or an appeal based on Spivery's concerns about the criminal complaint.

Spivery's response also briefly asserts that his "free will" to accept the plea agreement was affected by medication he was taking for a mental illness or disorder. At the plea hearing,

the trial court asked Spivery if he had taken any medication and he said he had taken something for "schizophrenic," but he could not remember the medication's name. When asked whether the medication affected Spivery's "ability to understand what you're doing in court today," Spivery responded, "No." His trial counsel also indicated that he was satisfied his client was entering his plea freely, voluntarily, and intelligently. Spivery's response to the no-merit report has not identified the medication he claims he was taking or explained how it affected his understanding. His answers at the plea hearing do not suggest he was impaired. We are not persuaded there would be arguable merit to a motion based on Spivery's bald assertion that his "free will" was affected.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved of further representation of Spivery in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals